FOR ARGUMENT (15)

No. 89-5809

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

vs.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

39 pp

QUESTIONS PRESENTED

1. Is *Caldwell* v. *Mississippi* a "new rule" within the meaning of *Teague* v. *Lane*?

2. Is the rule petitioner seeks in the present case new beyond *Caldwell*?

3. Does either rule qualify for the second exception to nonretroactivity under *Teague*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Miscellaneous

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

vs.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

---

1. CJLF has received written consent of the parties to file this brief.

The present case involves a collateral attack on a final judgment based on a claim which defendant did not mention at trial and which is not a bedrock rule of fairness. Such unnecessary attack on the finality of criminal judgments is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On September 28, 1979, petitioner Robert Sawyer and an accomplice murdered Fran Arwood in an attack of unspeakable savagery committed for no apparent reason. The murderers beat Ms. Arwood, scalded her with boiling water, and burned her with lighter fluid. Defendant stated to his accomplice that this last act was for the purpose of showing "just how cruel he could be." *State* v. *Sawyer*, 422 So. 2d 95, 97-98 (La. 1982). Sawyer had previously been indicted for murder of a four-year-old child and had pleaded guilty to manslaughter on that charge. *Id.*, at 100.

Sawyer was sentenced to death. His sentence became final in 1984, *Sawyer* v. *Louisiana*, 466 U. S. 931, before this Court's decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). He later contended that the prosecutor's closing argument was improper. That contention was rejected by the state post-conviction review judge, the state supreme court, the federal district court, and a panel of the federal court of appeals. The *en banc* court of appeals held that the *Caldwell* issue could not be considered because it was a "new rule" under *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

SUMMARY OF ARGUMENT

Teague v. *Lane*, *supra*, establishes a separation of fundamental from nonfundamental constitutional claims. Fundamental claims continue to receive full *de novo* review on habeas corpus, while nonfundamental claims are reviewed only for disobedience of controlling precedent. This separation is good law and good policy.

Caldwell v. *Mississippi*, *supra*, is a new rule, and the rule petitioner seeks to make in this case is new beyond *Caldwell*. Reasonable judges could differ and have differed in good faith on both points.

Caldwell is not a "bedrock procedural element" qualifying for the second *Teague* exception, because a *Caldwell* violation does not raise a grave danger of a return to the arbitrary sentencing which existed prior to *Furman* v. *Georgia*, 408 U. S. 238 (1972).

ARGUMENT

I. *Teague* establishes a graduated scale of habeas review.

In *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), this Court accepted, with some modifications, the approach to retroactivity on habeas corpus proposed by Justice Harlan in *Desist* v. *United States*, 394 U. S. 244, 256-257 (1969) (dissent) and *Mackey* v. *United States*, 401 U. S. 667, 691-693 (1971) (concurring in the judgment).[2] Although the question arises in the course of deciding on retroactivity, the problem dealt with in *Teague* "must be considered as none other than a problem as to the scope of the habeas writ." *Mackey*, 401 U. S., at 684.

The net result of *Teague* is a recognition that "claims of constitutional error are not fungible" for the purpose of determining the degree to which they will be considered on habeas corpus. See *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982) (Stevens, J., dissenting). In combination with earlier precedents, *Teague* establishes a graduated scale of review. Certain claims of fundamental error will receive full *de novo* review; some lesser claims will be reviewed only for state court disobe-

---

2. There seems to be some uncertainty as to how to designate this opinion. We call it "concurring in the judgment" because that is what it is in the *Mackey* case where it appears. The same opinion is also a dissent in *Williams* v. *United States*, 401 U.S. 646, 665 (1971).

dience of controlling precedent; some claims will not be reviewed on habeas at all.

A. The Perennial Questions.

Two questions continually recur in the habeas corpus area: what questions can be considered and what deference is due the trial and appellate courts' resolutions of those questions. For collateral attacks on felony convictions, the common law could not be more clear. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830); see also *Bushell's Case*, 124 Eng. Rep. 1006, 1009-1010 (C. P. 1670); 3 W. Blackstone, *Commentaries* 131 (1768).

The *Watkins* rule that habeas would lie for collateral attack only if the entire criminal proceeding was a nullity was still in force as late as *Ex parte Royall*, 117 U. S. 241, 248 (1886). Since then, however, the jurisprudence of habeas corpus has followed a zigzag course. As Justice Harlan said of another line of cases, habeas cases are "almost as difficult to follow as the tracks of a beast of prey in search of its intended victim." *Mackey*, *supra*, 401 U. S., at 676.[3] It is best to begin a search for consistency with a review of the purposes of collateral review.

---

3. Various versions of the history may be found in Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 483-507 (1963); W. Duker, *A Constitutional History of Habeas Corpus* (1980); *Stone* v. *Powell*, 428 U. S. 465, 474-482 (1976); and *Fay* v. *Noia*, 372 U. S. 391, 408-426 (1963). See also Oaks, *Legal History in the High Court — Habeas Corpus*, 64 Mich. L. Rev. 451 (1966) (challenging the historical veracity of *Fay* v. *Noia*).

B. Purposes of Collateral Review.

There have been a number of proposals to restrict the availability of collateral review and some vehement assertions that we should leave it untouched. Each proposal for change and each opposition to change is based on assumptions about the purposes of habeas corpus.

1. Forcing courts to toe the mark.

The traditional view of the principal purpose of habeas corpus as a collateral attack is that stated by Justice Harlan in *Mackey*, *supra*, 401 U. S., at 687: "The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts . . . to toe the constitutional mark."

This function of habeas corpus was unnecessary when Congress first extended federal habeas to state prisoners. Section 2 of the same act gave convicted prisoners a right to review of their federal questions in this Court by writ of error. Act of Feb. 5, 1867, ch. 28 § 2, 14 Stat. 385, 386. This right remained intact until the "Judge's Bill" of 1925 gave the Court discretionary review in most such cases. See generally R. Stern, et al., *Supreme Court Practice* 188-190 (6th ed. 1986). "[W]ith the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154 (1970). Since *Brown* v. *Allen*, 344 U. S. 443 (1953), it has generally been the rule that the prior state decision on a question of federal constitutional law carries no weight in federal habeas court. *Id.*, at 507 (opinion of Frankfurter, J.).

This deputizing of the lower federal courts as mini supreme courts, with the power to set aside state supreme court decisions on the basis of mere disagreement, has problems of its

own, however. Who is forcing the habeas courts to toe the mark? Who keeps *them* in line when they violate the right of the state to structure its criminal justice system as it sees fit, subject only to *genuine* constitutional restrictions? This Court must do so. See, *e.g.*, *Harris* v. *Pulley*, 692 F. 2d 1189 (9th Cir. 1982), *rev'd* 465 U. S. 37 (1984); *Adamson* v. *Ricketts*, 789 F. 2d 722 (9th Cir. 1986), *rev'd* 483 U. S. 1 (1987).

When this Court cannot take the case, a direct conflict between two coordinate judicial systems goes unresolved. In *State* v. *Vickers*, 768 P. 2d 1177, 1188, n. 2 (Ariz. 1989), for example, the Arizona Supreme Court refused to follow *Adamson* v. *Ricketts*, 865 F. 2d 1011 (9th Cir. 1988), cert. pending *Ricketts* v. *Adamson*, 88-1553. This is a most unseemly situation.

2. Correcting fundamentally unjust incarcerations.

The oldest and most important purpose of habeas corpus is to set free those prisoners who have done nothing illegal. The celebrated *Bushell's Case*, 124 Eng. Rep. 1006 (1670), for example, freed a juror held in contempt for bringing in the "wrong" verdict. The concept of jurisdiction was first expanded beyond its usual meaning to cover cases where the defendant had been convicted of violating an unconstitutional statute and was therefore actually innocent of any crime. See *Ex parte Siebold*, 100 U. S. 371, 376-377 (1880). The early habeas cases on procedural claims involved circumstances raising grave doubt whether the defendants were actually guilty. See, *e.g.*, *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923) (mob-dominated trial).

The governing statute has long required the habeas court to "dispose of the matter as law *and justice* may require." 28 U. S. C. § 2243 (italics added). Thus "the imperative of correcting a fundamentally unjust incarceration," *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982), is rightly assuming an increasing importance in habeas jurisprudence. Conversely, as we will describe in part C, below, rules which would overturn fundamentally *just* incarcerations on procedural grounds are coming under increasing scrutiny.

3. Giving every defendant a federal forum.

One reason often asserted against limitation of habeas corpus is the contention that every defendant should have the opportunity to litigate his federal questions in a federal forum. See, *e.g.*, Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 464 (1960). This position is founded on a deep distrust of state courts. *Ibid.* It asserts, in essence, that state courts are totally incompetent to adjudicate federal questions.

Our judicial system simply is not structured that way. It has been understood from the very beginning that state courts could pass on federal questions. *The Federalist* No. 82 (A. Hamilton). The desire for a federal forum, by itself, is insufficient to justify collateral attack on final convictions. A federal forum may be necessary where state remedies are grossly inadequate, as they may have been thirty years ago. See generally Reitz, *supra*. The contention that federal court resolution of every federal issue is essential today, however, is unsupportable.[4]

4. Guaranteeing perfection.

A fourth possible purpose of collateral review is to guarantee that no one is punished without a perfect trial. "But [this] Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 447 (1986) (plurality).

The "perfect trial" view obviously cannot be accepted in its extreme form, for otherwise every case would be infinitely relitigable. If convictions are ever to be final, we must at some point accept the proposition that some claims will no longer be considered. The unanimous decision of this Court in *United States* v. *Timmreck*, 441 U. S. 780 (1979) establishes this prin-

---

4. See *infra*, pp. 18-21.

ciple unequivocally. The question, then, is not *whether* to accept the possibility of imperfection, but only *where* to draw the line.

A slightly less extreme version of the perfection argument is to apply it only to capital cases under the threadbare battle flag proclaiming that "death is different." The fallacy here is exposed by comparing two hypothetical prisoners. The first has been sentenced to life in prison for a crime he may not have committed. The second has been sentenced to death for a crime he certainly committed but for which the death penalty may arguably not be "appropriate." Which case carries the potential for greater injustice?

All but the most extreme opponents of capital punishment would have to agree that imprisoning an innocent man for life is a greater injustice than executing *any* person who is actually guilty of willful, deliberate, premeditated murder. Yet the "death is different" brigade would have us devote *more* resources to relitigating the penalty phase of capital cases than we devote to reexamining the guilt phase of noncapital cases. The American Bar Association, for example, contends that any claim that a given procedure "lessens the integrity of sentencing determinations," apparently to *any* degree, should qualify for the second *Teague* exception. Brief for American Bar Association as Amicus Curiae ("ABA Brief") 10.[5]

---

5. It is worth noting here that the position set forth in that brief does *not* represent a consensus of the American bar. The ABA's task force, the Criminal Justice Section, the ABA's membership, and American attorneys as a whole are deeply divided on this subject. California Chief Justice Malcolm M. Lucas, co-chairman of the task force, wrote a dissent to the report. On page 19 of the dissent, he specifically rejects the majority's criticism of *Teague*. Chief Justice Lucas is uniquely qualified to address the problem of federal habeas for state prisoners, having served thirteen years as a federal district judge before joining the California Supreme Court. His dissent was joined on this point by District Judge Barefoot Sanders and endorsed in its entirety by eight members of Criminal Justice Section council. Report and Recommendations of the ABA Criminal Justice Section to the ABA

Once a person has been found guilty beyond a reasonable doubt, the choice of sentence within the allowable range of sentences for the offense is necessarily a "judgment call." Reasonable people will always differ as to what sentence is appropriate. Eleven percent of the American people oppose capital punishment in all murder cases; 29 percent favor it in all murder cases. U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Statistics — 1988*, at 230. Sentence choice within the allowable range can therefore *never* result in a miscarriage of justice of the magnitude of the lengthy imprisonment of an innocent person. The contention that we should give the sentencing determination a lesser degree of finality than the guilt/innocence determination receives is wholly without merit.

C. Limitations on Collateral Review.

1. Pre-Teague limitations.

Each of the limitations that this Court has adopted has accommodated the enforcement and correction of injustice purposes and rejected the federal forum and perfection rationales.

Stone v. *Powell*, 428 U. S. 465, 490-491, nn. 30, 31 (1976) recognizes that the exclusionary rule has no relevance to actual innocence and hence habeas review of such claims does not further the injustice correction purpose. *Stone* emphatically rejects the contention that a federal forum is required. *Id.*, at 493, n. 35. It accepts the possibility of imperfection at trial. The requirement is full and fair litigation, not absolute correctness. *Id.*, at 494-495. The enforcement purpose is not explicitly discussed, but presumably an outright defiance of clearly controlling precedent by the state court would not constitute full and fair litigation.

...Continued...

House of Delegates A70-A72 (1989) ("ABA CJS Report").

The procedural default rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) implicitly recognizes that when the trial judge's failure to rule on a question is due to defendant's own failure to raise it, there is no need for the enforcement function. See *id.*, at 91. However, the "actual innocence" exception carved out in *Murray* v. *Carrier*, 477 U. S. 478 (1986) recognizes the importance of the correction of injustice. Under *Sykes*, imperfections not objected to are usually tolerated, and they are generally not litigated on the merits in any forum, state or federal.

2. Partially adopted proposals.

Three proposed limitations on federal habeas are worth mentioning for the light they shed on the broader problem. Professor Bator's extensive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963), is devoted primarily to demonstrating that relitigation *de novo* on federal habeas is unjustified. He concludes with a recommendation that federal habeas courts consider actual guilt or innocence as an important, if not determinative, factor in deciding whether habeas relief ought to be granted. *Id.*, at 528.

Judge Henry Friendly spoke more directly to the same point. He proposed that "with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence. . . " before habeas relief could be granted. Friendly, *supra*, 38 U. Chi. L. Rev., at 150.

Neither proposal has been adopted for the first federal review. For successive petitions, however, Judge Friendly's view has been endorsed by a four-Justice plurality of this Court, *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986), with Justice Stevens indicating that guilt or innocence should be considered in the judge's discretion, *id.* at 476-477, along the lines of Professor Bator's proposal.

The partial acceptance and partial rejection of these innocence-driven proposals indicate that innocence is relevant but that there is a continuing need for the enforcement function as

well. A mechanism is needed to correct state court disobedience of controlling precedent, even in the case of clearly guilty defendants. It is most unlikely, however, that such disobedience would go uncorrected on the first federal petition.

A different but equally substantial reform was proposed by Justice Stevens in his dissent in *Rose* v. *Lundy*, 455 U. S. 509 (1982). Justice Stevens divided constitutional claims into four categories: meritless claims, harmless errors, reversible but nonfundamental errors, and fundamental errors. *Id.*, at 543-544. The last category is described primarily by examples. *Id.*, at 544, nn. 9-11. The third category includes all claims under rules which had been held nonretroactive under the since-discarded test of *Linkletter* v. *Walker*, 381 U. S. 618 (1965). *Id.*, at 543, n. 8. These claims, said Justice Stevens, should not be grounds for habeas relief *at all. Ibid.*

Like the Friendly and Bator proposals, this one is aimed at preserving habeas for the innocent, but in a less direct manner. It excludes by category those claims of error which are unlikely to result in the conviction of an innocent person, rather than by examining guilt or innocence in the individual case.

The separation of constitutional claims into the categories suggested by Justice Stevens would reject the implicit holding of *Brown* v. *Allen* that constitutional claims are fundamentally different as a category from other claims. Instead, constitutional claims would be subject to inquiry as to whether the claimed violation is fundamental, similar to the inquiry presently made for nonconstitutional claims. Compare *Davis* v. *United States*, 417 U. S. 333, 346 (1974) with *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979). Those not meeting the test would not be grounds for collateral relief.

3. Teague and Butler.

In this broader context, *Teague* can be seen as part of a larger effort to preserve the enforcement and injustice-correcting functions of habeas corpus while applying some limits

to the relitigation of the reasonable decisions of the appellate courts.

Teague v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)[6] is the culmination of this Court's long and difficult struggle with the question of how far back a new decision should reach in undoing the work of judges, lawyers, and juries who had duly obeyed the rules in effect at the time. Whenever a rule is not applied retroactively, the contention is made that the Court has sanctioned a constitutionally flawed conviction or denied someone his constitutional rights. See, *e.g.*, *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (1966) (Black, J., dissenting). That would be true if one subscribed to the Blackstonian belief that the Court merely discovers pre-existing law and does not make new law. See 1 W. Blackstone, *Commentaries* 69-70 (1765). However attractive the Blackstone approach may be in theory, though, it loses any connection with reality when applied to requirements as far removed from the text and history of the Constitution as the *Miranda* warnings, the exclusionary rule, or the detailed code of capital sentencing procedure which has been promulgated under the name of the Eighth Amendment.

The first step in a *Teague* analysis is to determine whether a rule is "new." "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 109 S. Ct., at 1070, 103 L. Ed. 2d, at 349. The examples given by the *Teague* court illuminate the meaning of this sentence. *Rock* v. *Arkansas*, 483 U. S. 44 (1987) broke new ground by extending the right to present a defense, established in *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), into the previously uncharted territory of hypnotically refreshed testimony. *Ford* v. *Wainwright*, 477 U. S. 399 (1986) imposed a new obligation on the states by constitutionalizing the long-established common-law prohibi-

---

6. *Teague* is a plurality opinion, but its rule was accepted by a majority in *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256, 274 (1989).

tion of execution of the insane.[7] Neither of these rules was a bolt from the blue. Both rules were derived from the principles established in prior cases.

The *Teague* court's alternative formulation of newness is more emphatic. "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 109 S. Ct., at 1070, 103 L. Ed. 2d, at 349 (italics in original). Because no precedent existing at that time of Teague's direct appeal could be said to dictate that the fair cross-section requirement extended to the petit jury, such an extension would be a new rule. *Ibid.*

This definition of "new rules" is considerably narrower than the one which can be gleaned from the thoughts haltingly advanced by Justice Harlan in his dissent in *Desist* v. *United States*, 394 U. S. 244, 263-265 (1969). Justice Harlan was reluctant to invoke nonretroactivity in cases where "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." *Desist*, *supra*, at 264. *Teague* draws the line on the opposite side of this gray zone, denying habeas relief if the result was not dictated by existing precedent.

If there had been any doubts whether *Teague* meant what it said, they were erased in *Butler* v. *McKellar*, 88-6677 (March 5, 1990). The case involved the retroactivity of *Arizona* v. *Roberson*, 486 U. S. 675 (1988). *Roberson* held that the prohibition against renewed police questioning after invocation of the right to counsel, *Edwards* v. *Arizona*, 451 U. S. 477 (1981), applies to a statement about an unrelated offense made voluntarily and after appropriate warnings. Butler's case had become final after *Edwards* but before *Roberson*. *Butler*, *supra*, slip op., at 3-4.

---

7. Petitioner's contention that *Ford* is cited as "new rule" because it supposedly overruled a prior case, Petitioner's Brief 31, is contrary to the plain language of *Ford* itself. See 477 U. S., at 405.

The court accepted for the sake of argument Butler's contention that *Roberson* was "within the 'logical compass' " of *Edwards* and possibly even "controlled" by it. Yet this was not determinative of the *Teague* "new rule" question. *Id.*, slip op., at 7. The Court noted "a significant difference of opinion on the part of several lower courts" and further noted that "*Roberson* was susceptible to debate among reasonable minds." *Ibid.* "It would not have been an illogical or even grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*. We hold, therefore, that *Roberson* announced a 'new rule.' " *Id.*, slip op., at 7-8.

The rationale of *Butler* further confirms that *Teague* was a fundamental rethinking of the scope of habeas corpus. "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.*, slip op., at 6.

The dissent reads *Butler* as turning away from the mandate of *Brown* v. *Allen*, 344 U. S. 443 (1953). "It has long been established, therefore, that federal habeas proceedings ought not accord *any* deference to state court's constitutional ruling under collateral attack." *Id.*, slip op., at 12 (Brennan, J., dissenting) (italics added) (citing *Brown*).[8] That reading is partially correct.

The rule that emerges from *Teague* and *Butler* is a combination of the deference to the prior decision that existed before *Brown* v. *Allen* and Justice Stevens' thesis that "claims of constitutional error are not fungible" for the purpose of determining whether collateral attack is warranted. See *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (dissent). The *Lundy* dissent would cut off habeas review for nonfundamental claims and preserve full, unencumbered habeas review for the fundamental claims. *Ibid.* The *Teague-Butler* rule separates the fundamental from the nonfundamental claims, and then considers the nonfundamental claims only on the ground that the state court refused to reach a result *dictated* by then-existing precedent, effectively deferring to any reasonable resolution of then-unresolved questions.

8. That was indeed the law for a substantial time, the 23 years from *Brown* until *Stone* v. *Powell*, 428 U. S. 465 (1976). However, it was *not* the law for a longer time before that. "Where the state courts have considered and adjudicated the merits of his contentions, . . . a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944); see also *Frank* v. *Mangum*, 237 U. S. 309, 334 (1915); *Schechtman* v. *Foster*, 172 F. 2d 339, 341 (2nd Cir. 1949) (Hand, J.).

The two *Teague* exceptions serve to separate constitutional claims into the two categories. The first exception is substantive and addresses innocent conduct and excessive punishment. A person convicted for burning the flag in protest before *Texas* v. *Johnson*, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), for example, could nonetheless obtain habeas relief. See *Teague*, 109 S. Ct., at 1075, 103 L. Ed. 2d, at 356. A person convicted of rape but not murder whose sentence of death was final before *Coker* v. *Georgia*, 433 U. S. 584 (1977) could also obtain relief from a sentence which exceeds the maximum for his conduct. See *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2952, 106 L. Ed. 2d 256, 285 (1989).

The second *Teague* exception focuses on procedure rather than substance, yet it retains a strong connection with actual innocence. "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness *and accuracy* of the criminal proceeding." *Saffle* v. *Parks*, 88-1264, slip op., at 10 (March 5, 1990) (italics added). The *Teague* court went out of its way to emphasize the injustice-correcting function of habeas review, modifying the rule as proposed by Justice Harlan "by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 109 S. Ct., at 1076-1077, 103 L. Ed. 2d, at 358.

This second exception is similar to the *Lundy* dissent's fourth category, and *Teague* quotes the description of that category. *Ibid.* The *Lundy* dissent cites three cases as examples of this category, 455 U. S., at 544, nn. 9-11, and it is no

coincidence that *all* of these cases are over a half-century old. This Court has been scrutinizing state criminal procedures for a very long time. With the exception of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the truly fundamental problems which raised substantial danger of convicting innocent people were all dealt with under the Due Process Clause, without the need for the incorporation doctrine.

The *Teague* plurality's observation that "we believe it unlikely that many such components of basic due process have yet to emerge," 109 S. Ct., at 1077, 103 L. Ed. 2d, at 358, is a cautious understatement. It is unlikely that any have emerged in many years.[9]

D. Categories of Claims.

Teague, *Butler*, *Stone* v. *Powell*, 428 U. S. 465 (1976), *Davis* v. *United States*, 417 U. S. 333 (1974), and *United States* v. *Timmreck*, 441 U. S. 780 (1979) leave us with the following stratification of claims of error of law in cases where the objection has been timely raised on direct appeal and rejected there:[10]

1. Claims that the act is not criminal or that the punishment is *per se* constitutionally excessive. [The first *Teague* exception.]

2. Claims that a fundamental procedural requirement, without which the likelihood of an accurate conviction is seriously diminished, has not been met. [The second

---

9. Space does not permit a full explanation of why *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) does not alter the rule. This argument was presented in our brief in *Selvage* v. *Collins*, 87-6700, at 15-17. In addition, *Saffle* v. *Parks*, 88-1264, slip op., at 7-8 (March 5, 1990) disposes of the contention.

10. This classification does not consider factual disputes, procedural default, or the exhaustion rule.

Teague exception.]

3. All constitutional claims not falling in categories 1, 2, or 4.

4. Exclusionary rule claims. [*Stone* v. *Powell*, *supra*.][11]

5. All nonconstitutional claims not falling in categories 1 or 2.

These categories form a graduated scale of review on habeas corpus. Just as all equal protection claims do not receive the same degree of scrutiny, even though they are all constitutional claims, see, *e.g.*, *Plyler* v. *Doe*, 457 U. S. 202, 216-218 (1982), so all criminal procedure claims should not receive the same review on habeas. The claims are not fungible; they are ranked in the order of the likelihood that noncompliance would result in injustice.

The first category receives full *de novo* review. A violation here is *per se* an injustice. The second category also receives full *de novo* review. Although an unjust result is not a certainty, it is a high enough probability to overcome the otherwise compelling interest in finality.

The third category involves claims where the probability of injustice is substantially attenuated. Given the greatly reduced need for the injustice-correcting function of habeas corpus, the new structure generally trusts the state court to resolve unsettled questions responsibly. The enforcement function of habeas requires that the judgment be set aside if the state court fails to make a "reasonable, good-faith interpretation[] of existing precedents," *Butler*, *supra*, slip op., at 6, but otherwise the state court judgment stands. In that event, we are back to the common law rule. "The law trusts that court with

---

11. This category may include some prophylactic rule claims as well. See *Duckworth* v. *Eagan*, 109 S. Ct. 2875, 2881, 106 L. Ed. 2d 166, 179 (1989) (O'Connor, J., concurring).

the whole subject, and has not confided to [the habeas] court the power of revising its decisions." *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 207 (1830).

In the fourth category, full and fair litigation in the state court precludes habeas review. The complete irrelevance of the claim to actual innocence precludes interference on habeas in all but the most extreme cases. In the fifth category, nonfundamental statutory claims, collateral attack is not allowed.

E. Objections to the Categories of Claims.

Justice Brennan has objected from the very beginning that the separation of constitutional claims into categories is illegitimate because Congress has allegedly mandated full *de novo* review of all questions of federal constitutional law. *Stone* v. *Powell*, 428 U. S. 465, 529 (1976) (Brennan, J., dissenting). The most succinct answer may be found in *Rose* v. *Lundy*, 455 U. S. 509, 548, n. 18 (1982) (Stevens, J., dissenting). The precedent to the contrary in *Stone* is now fourteen years old, and contrary precedents older than *Brown* v. *Allen* have previously been noted.[12] An appeal to *stare decisis* which looks only at precedents from 1953 to 1975, and not at those before and since, rings a bit hollow. The broad scope of habeas review was created judicially. The legitimacy of contracting it judicially in the absence of any clear word from Congress[13] should, by this point, be beyond question.

A second, institutional objection is that the lower federal courts will be shut out of the process of developing constitutional doctrine. See, *e.g.*, Brief for NAACP Legal Defense and

---

12. See *supra*, note 8, at p. 14.

13. The *Stone* v. *Powell* question was placed before Congress when it considered the habeas rules. It decided not to decide. H. R. Rep. No. 1471, 94th Cong., reprinted in 1976 U. S. Code Cong. & Adm. News 2478, 2479.

Education Fund as Amicus Curiae ("NAACP Brief") 34-36. This objection is utter nonsense. The escalating war on drugs and the resulting increase in federal criminal cases will give the federal courts more than enough grist for their mills, if it does not bury them altogether. Capital cases will have their place in this workload. See 21 U. S. C. § 848(e) (federal death penalty for drug-related murders.)

What the federal courts of appeals will *not* be doing is establishing precedents which are binding *de facto* on courts which they have no authority to bind *de jure*. See 1B J. Moore, et al., *Moore's Federal Practice* ¶ 0.402[1] at 23 (2nd ed. 1988) (state courts not bound by circuit precedent). " 'Tis a consummation devoutly to be wished." W. Shakespeare, *Hamlet*, act III, scene i (1600).[14]

A third, more policy-oriented objection concerns the effect of lowered habeas scrutiny on state court decision-making. "Because state courts need not fear federal habeas so long as they avoid clearly unreasonable constructions of existing doctrine, they will have *no incentive* to reflect carefully about existing legal principles and thereby to develop novel and more sophisticated understandings of constitutional guarantees." *Butler* v. *McKellar*, 88-6677, slip op., at 15, n. 12 (Brennan, J., dissenting) (March 5, 1990) (italics added). See also NAACP Brief 34.

This statement lays bare the fundamental assumption which lies at the root of the deep and bitter division over habeas corpus. One can easily understand why persons who hold such a dismally low opinion of state court judges would be aghast at a law which "trusts that court with the whole subject." This statement paints a picture of state judiciaries which are utterly devoid of any sense of responsibility or of any duty to the Constitution and which are motivated solely by the desire to avoid grants of habeas corpus.

---

14. See *supra*, pp. 5-6.

Brown v. *Allen*, 344 U. S. 443, 477 (1953) was a racial discrimination case which arose in North Carolina in 1949. At that time, and under those circumstances, a low opinion of state courts may well have been justified. But this is 1990. An entire generation of lawyers has been educated, has practiced, and has reached the prime of their careers in an atmosphere of respect for civil rights and civil liberties. These are the people who now sit on the benches of our state courts. The assumption that nothing but habeas corpus restrains them from seething hostility to constitutional rights is unwarranted, unfair, and untrue.

Last summer, the Criminal Justice Legal Foundation did a study of capital habeas corpus cases in the Eleventh Circuit. Out of 71 cases that represented that court's last word on the merits there were 28 grants and 43 denials. Scheidegger, *Rethinking Habeas Corpus* 34 (1989).[15] The most striking finding was that there was *not one single case* of a federal claim which was timely presented to the state courts and unreasonably rejected by them. *Ibid*. Furthermore, only one successful habeas petitioner had even a colorable claim that he did not kill the victim. *Id*., at 38.[16] Only one of the remaining 27 presented evidence which could be described as compelling grounds for mercy. *Id*., at 40.[17]

The study reached these conclusions, among others:

"1. The state supreme courts are conscientiously applying the precedents of the United States Supreme Court. Every capital defendant who properly presents his

---

15. This paper is not yet available in published form. Copies have been lodged with the clerk and furnished to counsel.

16. Counsel for amicus is informed that this petitioner pleaded guilty to noncapital murder on retrial.

17. Whether the grounds were compelling even in that case depends on whether one accepts the evidence presented in the habeas hearing or the evidence presented at sentencing. *Id*., at 40, n. 326.

claim receives a decision following those precedents, as interpreted within limits in which reasonable judges may differ.

* * *

"3. Federal habeas corpus is almost never employed to correct fundamentally wrong results. Almost all of the cases involve well-deserved sentences for horrible crimes." *Id*., at 43 (footnotes omitted).

The effect of *Teague* on state courts is likely to be the opposite from the one envisioned by its detractors. It removes an impediment to state court responsibility. "I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra*, 76 Harv. L. Rev., at 451. Indeed, the contrary argument is an exceptionally peculiar one to make in a *Caldwell* case. The argument assumes that *de novo* review will have an effect on the state courts which is precisely the opposite of the effect which the *Caldwell* court asserted reviewability would have on the jury. See *Caldwell* v. *Mississippi*, 472 U. S. 320, 330-333 (1985).

Finally, the validation of reasonable, good-faith resolution of undecided federal questions largely removes the powerful disincentive for state courts to reach the merits which *Brown* injected into the law of habeas corpus 37 years ago. State court rejection of a federal claim on procedural grounds will generally be respected by federal courts, *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), but until *Teague-Butler* the state court ruling on the merits of a question of law received no respect.

"I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none." *Brown* v. *Allen*, *supra*, 344 U. S., at 552 (Black, J., dissenting). *Teague-Butler* provides the state courts with some assurance that they can proceed to the merits

of unresolved questions of law without opening their decision to endless second-guessing on habeas corpus.

The multi-tiered system of habeas review established by *Stone*, *Teague*, and *Butler* is a rational, responsible accommodation to the changing needs of a changing nation. The growing confidence in state courts is justified. The objections are without merit. These cases are good law and sound policy.

II. Petitioner seeks to apply two "new rules" on habeas corpus.

Petitioner asserts that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) is not a "new rule" within the meaning of *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). The reasons given are that *Caldwell* was "a predictable development," Petitioner's Brief 12, and "both predictable and unexceptional," *id*., at 15. "The essence of *Teague*," petitioner says, "is that a federal court must consider how the state courts would have viewed a *Caldwell* issue at the time Robert Sawyer's conviction became final." *Id*., at 28.

This contention is flatly contrary to the plain language of *Teague* that new rules are those not *dictated* by existing precedent. 109 S. Ct., at 1070, 103 L. Ed. 2d, at 349. The question is not how states *would* have viewed a *Caldwell* issue but rather how they were *required* to view a *Caldwell* issue. If reasonable judges faithfully applying existing precedent could differ, the decision is final when it is final.

If there had been any doubt that petitioner's interpretation of the *Teague* requirement was incorrect, it was erased by the decision in *Butler* v. *McKellar*, 88-6677, slip op., at 6-8 (March 5, 1990). Not only is *Caldwell* a new rule, but the extrapolation which petitioner seeks to make from *Caldwell* would be an additional new rule.

Petitioner goes to considerable length to demonstrate that *Caldwell* is an independent product of the "procedurally cruel

and unusual punishment"[18] jurisprudence created after *Furman* v. *Georgia*, 408 U. S. 238 (1972) and not an outgrowth of prior due process law on prosecutor argument, *Donnelly* v. *De Christoforo*, 416 U. S. 637 (1974). Petitioner's Brief at 28-34. This characterization of *Caldwell* is quite right and totally undermines petitioner's position.

The law of capital punishment was plunged into chaos by *Furman* and the rapid rewriting of statutes which followed it. The sudden appearance of strict procedural requirements in a constitutional provision previously thought to have only substantive content left a great many questions unanswered. Most of these questions dealt with the degree of discretion the jury was required or permitted to have and the factors the jury may or must consider in exercising that discretion. See, *e.g.*, *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Lockett* v. *Ohio*, 438 U. S. 586 (1978). These cases involve analysis of statutes and jury instructions to determine if the state had structured its capital sentencing system in such a way as to successfully navigate the narrow channel between the arbitrariness condemned in *Furman* and the rigidity condemned in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). These issues were far removed from questions of the propriety of prosecutors' arguments.

The last full hearing on direct review in this case was *Sawyer* v. *State*, 442 So. 2d 1136, decided November 23, 1983. A mere two weeks before, this Court vacated a stay of execution in a case presenting a virtually identical claim: *Maggio* v. *Williams*, 464 U. S. 46 (1983).

The prosecutor's argument in *Williams* is quoted extensively in Justice Stevens' concurrence. 464 U. S., at 53-54. It is similar to the one in the present case. The majority found that

---

18. Amicus uses this admittedly awkward term to refer to rules of law that deem a given punishment for a given crime by a given defendant either "cruel and unusual" or not depending on the procedure by which that punishment is determined. The resemblance to "substantive due process" is more than skin-deep.

the "contention[] warrant[s] little discussion." *Id.*, at 49. While the claim might have been dismissed on abuse of the writ grounds, "the District Court nevertheless gave it full consideration . . . . Applying the standard established in *Donnelly* v. *De Christoforo*, 416 U. S. 637 (1974), the District Court examined the prosecutor's closing argument at length and concluded that it did not render Williams' trial fundamentally unfair." *Id.*, at 49-50. The majority summed up by saying

> "The District Court's careful opinion was fully reviewed by the Court of Appeals, which found no basis for upsetting the District Court's conclusion that Williams' contentions were meritless. *The arguments that Williams raised for the first time in these proceedings are insubstantial*, and the arguments that he has attempted to relitigate are no more persuasive now than they were when we first rejected them. We conclude, therefore, that the stay entered by the Court of Appeals should be vacated." *Id.*, at 52 (italics added).

Williams is not a ruling on the merits of the prosecutor's argument. However, it is certainly a very strong implication that *Donnelly* was, at that time, the correct standard for determining whether a prosecutor's argument violated any federal right and that the Eighth Amendment had not yet reached out to govern such arguments. The Court was well aware of the considerations which later formed the basis of *Caldwell*. They are clearly stated in the concurrence. *Id.*, at 54-55 (Stevens, J., concurring in the judgment). Yet the majority found the argument "insubstantial."

When *Caldwell* was decided, it broke new ground by extending the Eighth Amendment to an area formerly regulated only by the Due Process Clause and state law. *Caldwell* is a new rule.

Not only is *Caldwell* a new rule, but the rule petitioner would make in this case is new beyond *Caldwell*. In the pre-*Teague* panel decision of the Fifth Circuit in this matter, *Sawyer* v. *Butler*, 848 F. 2d 582 (1988), the majority applied *Caldwell* as the controlling precedent and found the present case distinguishable. *Id.*, at 595-599.

The prosecutor's argument in this case has been found not to require reversal in post-*Caldwell* rulings by (1) the district court magistrate, 848 F. 2d, at 587; (2) the district judge, *ibid.*; and (3) the court of appeals panel majority, *id.*, at 599.[19] "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents . . . ." *Butler* v. *McKellar*, *supra*, slip op., at 6. Are all three of these interpretations unreasonable or in bad faith? If not, the rule petitioner seeks is "new" beyond *Caldwell*.

III. *Caldwell* is not within the second *Teague* exception.

The final, and dispositive, question is whether the rules sought to be applied here are " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 88-1264, slip op., at 10 (March 5, 1990). Justice Stevens has already answered a very similar question in the negative. *Maggio* v. *Williams*, 464 U. S. 46, 55-56 (1983) (concurring in the judgment). The same answer should be given in this case.

There does not yet exist much concrete guidance on the second exception. The generality of the wording in *Teague* lends itself to radically different interpretations, particularly in an area of the law where opinion runs as strongly as it does on capital punishment.

Concrete guidance on this point is more urgently needed in the penalty phase than elsewhere, but giving it is also more difficult. Most people can agree on what accuracy in guilt determination means, if not on how to achieve it, but the question of the appropriate punishment for a premeditated murder is *always* a matter of opinion.[20] It is difficult to speak of

---

19. The principal state habeas opinion predates *Caldwell*. J. A. 74-86.

20. See *supra*, p. 9.

"accuracy" when the target is so diffuse that we can never agree on whether the bull's-eye has been hit.

Several possibilities suggest themselves. One is to hold *Teague* itself inapplicable to the penalty phase under the "death is different" theory. That path has been rejected in *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256, 275-276 (1989) and *Saffle* v. *Parks*, 88-1264 (March 5, 1990).

The opposite answer would be to apply the second *Teague* exception literally and therefore hold it to be *per se* inapplicable to the penalty phase. Procedures which follow the verdict of guilt and go only to penalty are necessarily not "procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague* v. *Lane*, 109 S. Ct. 1060, 1076-1077, 103 L. Ed. 2d 334, 358 (1989).

A middle course can be charted by taking one step back and asking what question in the penalty phase is analogous to the "accurate conviction" question in the guilt phase. Accuracy of conviction is the fundamental purpose of the trial. It is the principal reason for the entire elaborate set of rules that make up the law of criminal procedure. Procedures within the second *Teague* exception are those without which the entire proceeding is derailed and rendered unable to proceed reliably to its goal, not merely those which might have some detrimental effect.

The fundamental purpose of modern capital sentencing procedures is avoidance of the arbitrariness condemned in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Furman was not granted relief because death is a necessarily cruel punishment or because it was necessarily disproportionate to his crime. Instead, relief was granted because the systems then in place lacked any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.*, at 313 (opinion of White, J.). A "bedrock procedural element" of the penalty phase, amicus submits, is one without which the state's sentencing system as a whole lacks that meaningful basis.

With any discretionary selection process, there will be some cases which obviously warrant selection, some which obviously do not, and some which fall into a midrange. See *McCleskey* v. *Kemp*, 481 U. S. 279, 287, n. 5 (1987). Within this midrange, the result will turn on random factors, such as the personal views of the jurors selected for the particular case, or perhaps even on illegitimate factors such as the race of the victim. Unpredictability and discrepancies within the midrange are an inevitable result of discretionary sentencing. See *id.*, at 311-313. The only way to escape such results would be to require the mechanical sentencing which this Court has prohibited. See *Sumner* v. *Shuman*, 483 U. S. 66, 85 (1987).

A procedure which merely has a possible impact one way or the other in a close case is thus insufficient to raise a grave danger of returning the state's sentencing system to pre-*Furman* arbitrariness. To present such a danger, the procedure must be one which is likely to regularly produce death sentences at the low end of the range of culpability, i.e., in cases where there should be a consensus that death is not the appropriate punishment.

The clearest example is *Furman* itself. In the complete absence of articulated standards for sentencing, there was grave danger that defendants at the low end of the range of culpability were being selected on the basis of illegitimate factors, especially race. Two of the petitioners in *Furman* were Black men convicted only of rape, not murder. 408 U. S., at 252-253 (opinion of Douglas, J.). This Court's pre-*Furman* cases contain even worse examples of shockingly disproportionate sentences. See, *e.g.*, *Boykin* v. *Alabama*, 395 U. S. 238, 239-240 (1969) (robber with no prior offenses).

A second example is furnished by *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). *Woodson* involved a sweeping statute with a mandatory death penalty for all first-degree murderers. The plurality recognized that this statute would not be enforced as written, and widespread jury nullification in low-range cases was inevitable. *Id.*, at 291-296. Many low-range cases would still result in death sentences under such a proce-

dure, however, as many juries would believe they had no choice.

The third, and perhaps last, of the fundamental rules of the post-*Furman* law of sentencing can be found in Justice Blackmun's concurrence in *Lockett* v. *Ohio*, 438 U. S. 586, 615-617 (1978). The Ohio statute allowed consideration of only three, narrow mitigating circumstances, which did not include two circumstances universally regarded as powerfully mitigating: minor accomplice status and lack of intent to kill. *Id.*, at 613. This system produced a death sentence in what was quite obviously a low-range case, and it carried a grave risk of doing so in many other similar cases. Justice Blackmun noted that these two mitigating circumstances, at least, must be considered. *Id.*, at 615-617. However, he was unwilling to join in the sweeping rule announced by the plurality. *Id.*, at 613.

A prime example of a nonfundamental rule is the one announced by the *Lockett* plurality, to the extent that it requires consideration of circumstances which most people would consider either not mitigating at all or entitled to relatively little weight as compared to the circumstances generally set forth in statutory lists. See, *e.g.*, Model Penal Code § 210.6 (4), reprinted in 2 W. La Fave & A. Scott, *Substantive Criminal Law* 517-518 (1986). While evidence of good behavior in jail may be relevant and even required, see *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), that evidence does not transform a mid-range case to a low-range case. The absence of that evidence does not present the grave danger of pre-*Furman* arbitrariness which is fundamentally inimical to the basic purpose of the process.

It is no accident that the fundamental rules noted above were established in the early years of modern capital punishment jurisprudence. In the natural evolution of a body of law, the most basic questions are answered first. The longer a question goes unanswered, the less likely it is to be fundamental and the more likely it is to be "fine tuning." See *Teague*, 109 S. Ct., at 1077, 103 L. Ed. 2d, at 358.

Applying these principles to *Caldwell* and to petitioner's proposed extension of *Caldwell* is straightforward. In *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), the Court speculated on various reasons why the argument presented and the trial court's seeming endorsement of it might have a tendency to sway the jury toward a sentence of death. The jurors *might* wish to "send a message" even though they did not believe death to be an appropriate sentence. *Id.*, at 331. They *might* think that a reviewable death sentence released them from responsibility while a nonreviewable life sentence did not. *Id.*, at 332. Reviewability *might* be used in jury deliberations to convince holdout jurors. *Id.*, at 333.

Contrasting these speculative hypotheses with the fundamental defects in cases like *Lockett* dramatically illustrates the difference. Lockett's jurors had only two choices: to return the verdict they did regardless of how strongly they felt that she did not deserve the death penalty or to defy their instructions. In *Caldwell*, all we have is unsupported speculation about what might have happened in the jury room. The chances of any of these things happening in a low-range case where mitigation clearly outweighs aggravation are nil. *Caldwell* is definitely not a fundamental rule of the type contemplated in the second *Teague* exception.

Petitioner's proposed extension of *Caldwell* is even more obviously outside the scope of the exception. The *Caldwell* court found it significant that the trial judge openly agreed with the prosecutor's remarks. 472 U. S., at 339. The Fifth Circuit panel majority in the present case found the lack of such an endorsement significant. 848 F. 2d, at 598. The lack of objection by competent counsel is also highly significant. *Maggio* v. *Williams*, 464 U. S. 46, 55-56 (1983) (Stevens, J., concurring in the judgment.)[21]

---

21. The Fifth Circuit panel unanimously rejected the ineffective assistance claim, 848 F.2d, at 588-593. Failure to object to the prosecutor's argument was not among the allegations of ineffectiveness. *Ibid.*

Jurors are not stupid. They know that both lawyers are advocates and both may overstate their cases. The jurors know they are to take their guidance from the judge. *Boyde* v. *California*, 58 U. S. L. W. 4301, 4305 (March 5, 1990). To assume that they will place more emphasis on the prosecutor's argument about reviewability than they will on the judge's specific direction as to their responsibility adds another layer of speculation on top of *Caldwell*'s already speculative hypotheses.

The Louisiana Supreme Court aptly described this case. "Never before has this court been presented on appeal of a death sentence with such callous indifference to human suffering as was displayed here." *State* v. *Sawyer*, 422 So. 2d 95, 105 (La. 1982). On these horrible facts, it is difficult to imagine twelve rational people coming to any other conclusion. The punishment imposed in this case is totally just, thoroughly deserved, and long overdue.

Conclusion

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Dated: April, 1990

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation